82-1218

No.

In the Supreme Court of the United States

October Term, 1982

FLOWERS INDUSTRIES, INC., JERRY KRALIS, AND KRALIS BROS. FOODS, INC.,
Petitioners,

vs.

PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an appeal taken 87 days after entry of an order of dismissal is timely and within the jurisdiction of the Court of Appeals, the district court having refused to consider plaintiffs' Rule 59 newly discovered evidence motion on its merits and having refused to adjudge the motion because it was legally deficient.

2. Whether a legally deficient Rule 59 motion, improperly made and resting upon grounds either not sufficiently stated or for which no proof was offered, can extend the time for taking an appeal, irrespective of whether the district court has refused to entertain the motion or to decide it on its merits.

3. Whether a non-resident defendant, whose objection to the personal jurisdiction asserted is founded upon documentary evidence and upon affidavits, not objected to, which have been specifically described *by the Court of Appeals* as having been *"not adequately countered"* by plaintiff, is denied due process by the Court of Appeals' inexplicable reversal of the district court's order dismissing that defendant.

4. Whether, when personal jurisdiction allegations of complaint are controverted by competent affidavits of defendants and by documentary evidence, none of which is objected to, plaintiff may be deemed to have overcome such proof and to have made a *prima facie* showing of jurisdictional contact with "affidavits" which are totally silent as to any material fact establishing any jurisdictional contact and which are dismissed by the district court as "mere conclusions, unsupported by specific averments of fact."

5. Where amenability to personal jurisdiction depends totally upon whether a non-resident's *one and only*

contact with the forum State, a *single* long-distance telephone call, was or was not slanderous in its nature, the non-resident's affidavit denying that slander being uncontradicted, whether the *prima facie* showing of personal jurisdiction required of the plaintiff could possibly be made without any evidence from the other participant in the call that the one contact by phone was in fact slanderous in its quality and nature?

6. Whether due process contemplates that even so modest a burden of proof as a *prima facie* showing of personal jurisdiction can be met by affidavits, which are duly objected to, are at most conjecture, hearsay, or are subscribed by one permanently incompetent to testify under state law, and which affidavits have been totally rejected by the district court as being "mere conclusions, unsupported by specific averments of fact."

7. Whether the Court of Appeals is at liberty to disregard the district court's own evaluation of the plaintiffs' affidavits, to ignore those affidavits' defects when they are raised on appeal and to furnish by assumption, speculation or baseless inference that essential, material jurisdictional fact which plaintiff never attempted to prove in the district court.

8. Whether, though a corporate agent might be personally *liable* for an alleged tort committed in his corporate role, that corporate agent can, consistent with due process, be held personally *amenable,* as a non-resident, to the jurisdiction of the forum State, where that agent has had contact with the forum only by virtue of his act as a fiduciary of the corporation, has acted not for his own benefit but for that of his corporate employer, that corporation being a real entity and not a mere shell, the agent having no stock ownership interest therein.

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The petitioners Flowers Industries, Inc., Jerry Kralis and Kralis Bros. Foods, Inc. pray respectfully that a writ of certiorari issue to review the order denying petitioners' motion to docket and dismiss the appeal in the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 10, 1982, and further, to review the judgment and opinion of said court entered in this proceeding on September 22, 1982.

OPINION BELOW

The order of the Court of Appeals denying the motion to docket and dismiss the appeal as untimely was not reported but appears in the Appendix hereto. The subsequent judgment and opinion of the Court of Appeals is reported at 688 Federal Reporter, Second Series, at page 328. The memorandum order of the United States District Court for the Northern District of Mississippi was not reported but appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 22, 1982. A timely petition for rehearing was denied on October 22, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Petitioners argue that the assertion of personal jurisdiction over them, without any attempt to make a *prima facie* factual showing that their *one "contact"* by a long-distance phone call from Indiana to the forum State was slanderous in quality and nature and that the civil action arose from that *one contact*, denies to them the rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to-wit:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

Jurisdiction was invoked under 28 U.S.C. §1332 in a suit demanding $81,000,000.00 for Mott's, Inc., the world's largest fowl processor, and for its chairman of the board and majority stockholder, Pete Brown, a Mississippi corporation and citizen, respectively. Flowers, a stock holding company incorporated in Georgia, and Kralis Bros., an Indiana corporation competing with plaintiffs, and Jerry Kralis, an Indiana citizen and president of the latter company, are petitioners here.

In 1973, plaintiff Brown was indicted on ten felony charges of perjury in swearing to false and fraudulent tax returns. He pled guilty, was fined the maximum, and sentenced to three years in prison.[1] This conviction was raised in the district court and Court of Appeals. By operation of Mississippi law, Brown became permanently incompetent to give sworn testimony. Miss. Code Ann. §13-1-11 (1972). See Rule 601, Federal Rules of Evidence.

In 1979, Brown and Mott's applied to U.S.D.A./FmHA for a federal loan or loan guarantee of $4,000,000.00 under the program established by 7 U.S.C. §1932. Congress provides by §1932(d)(3), and implementing regulations dictate, that the Secretary of Labor shall inquire of plaintiffs' competitors, such as Kralis Bros., about the advisability of the loan or guarantee and shall certify statutory compliance. Approval of any loan or guarantee of this magnitude can only come directly from the office of the Secretary of Agriculture in Washington, D.C.

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1. *United States v. Pete Brown*, CRW731-K, Minutes of the United States District Court for the Northern District of Mississippi, Western Division, June 25, 1973.

During this inquiry period, Kralis Bros. learned from others in the fowl processing industry that plaintiffs might be simultaneously under investigation in Mississippi for criminal alteration of exported poultry grading certificates issued by U.S.D.A. and involving sales to Jordan and the Canary Islands.[2]

Jerry Kralis called on behalf of his company, Kralis Bros., long distance from Mentone, Indiana, to Oxford, Mississippi, to inquire of the United States Attorney about whether these investigation rumors were true and about what subject was being investigated. An Assistant United States Attorney, John Hailman, confirmed to Mr. Kralis that an investigation was *in progress* but he declined to reveal the particulars because the case was being prepared for submission to the federal grand jury. That Mr. Kralis made only this lawful inquiry is not contradicted by any proof submitted into the record. Defendants maintained below that Mr. Kralis in so doing merely availed himself of privileges, benefits, and protections afforded by *federal* law, not *Mississippi* law.

This *single* long-distance phone call to the federal building at Oxford is the *sole jurisdictional contact alleged* between Mississippi and any of the three petitioners. Brown was not a party to the call and the Court of Appeals noted correctly that only petitioner Kralis or Mr. Hailman could know the quality or nature of the single phone call. Plaintiffs did not offer Hailman's testimony to substantiate the charge that this one call had jurisdictional implications.

The complaint alleged in conclusory fashion that *U.S.D.A./FmHA declined* to loan or guarantee Brown's

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2. U.S.D.A. investigations numbers Hq 3320-1 and Hq 3320-2.

and Mott's $4,000,000.00 application because Jerry Kralis allegedly slandered plaintiffs during that *one call to an Assistant U. S. Attorney* in Mississippi. By this alleged slander, petitioners are supposed to have injured plaintiffs' reputations and interfered with prospective, unspecified business relations with unnamed persons, i.e., deprived plaintiffs of the use of the money to be borrowed, repayment of which would be secured by the U. S. Treasury.

There are no allegations that the official who acted for U.S.D.A./FmHA in denying the application was privy to what allegedly or actually passed between Mr. Kralis and Mr. Hailman and no evidence tending to show or from which it can be inferred reasonably that U.S.D.A./FmHA did not act properly in denying the application or that U.S.D.A./FmHA was *unaware of its own participation* in these investigations while the plaintiffs' application was pending. Long-arm process was used for a tort "committed in part" in Mississippi, Miss. Code Ann. §13-3-57 (1972).

In separate answers, petitioners admitted that Mr. Kralis made a call[3] but denied any wrongdoing and duly moved for dismissal under Fed.R.Civ.P., 12(b)(2). All other jurisdiction allegations were denied.

A nine-month period for discovery was ordered but plaintiffs conducted no discovery at all.

The motion to dismiss was supported by documentary evidence[4] and by five affidavits, all relevant and based

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3. But for Mr. Kralis' admission of the fact of the one call itself, there would be no proof of record of *any* contact with Mississippi, of whatever character, since plaintiffs did not attempt to prove even that the call was made.

4. The Fifth Circuit incorrectly stated that the motion was based upon affidavits *only*. The district court's memorandum order speaks at length to the defendants' documents.

upon personal knowledge. Mr. Kralis stated under oath that he slandered no one, but merely made a lawful inquiry of the U. S. Attorney's subaltern about a matter of legitimate public concern. Plaintiffs posed no objections to these affidavits or documents.

Plaintiffs attempted to counter with four affidavits which were duly objected to; two were expressly based on hearsay, given upon information and belief only, not upon personal knowledge, and stated gross *conclusions* only. Two more affidavits, likewise conclusory, were subscribed by the incompetent Mr. Brown, who again perjured himself in these affidavits, asserting his personal knowledge, gleaned from a numbered Tupelo, Mississippi, city business permit, that petitioner Flowers was licensed to sell at retail in Tupelo, Mississippi. But Brown did not produce a copy of the license. Petitioners, however, procured these documents from the Tupelo City Clerk, offered them and positively disproved Brown's falsehood. The district court remarked that this one Tupelo license allegation, though shown false, was the *only* positive fact averred by plaintiffs, the rest being mere conclusions.

Since plaintiffs never contacted Mr. Hailman and did not offer his affidavit or deposition, no proof was submitted to establish that the single contact by a long-distance call imported a slander of either plaintiff.

Upon this record, the district court dismissed all three petitioners, finding that plaintiffs' affidavits were made up of:

> [M]ere conclusions, unsupported by specific averments of fact.

* * *

> . . . Thus plaintiffs have failed to prove that Defendants Flowers, Kralis Foods and Jerome Kralis have purposefully availed themselves of any benefits, privleges, or protections afforded by the State of Mississippi. In light of the facts set out above, defendants seek dismissal of this cause on the grounds that there exist no "minimum contacts" between any of the three defendants and Mississippi, the forum state, ... We agree.[5]

A Rule 59 motion predicated upon "newly discovered evidence" (purporting to show *one* petitioner's alleged *out-of-state* business dealings with another Mississippi corporation many years before, but actually showing only the out-of-state dealings of a *non-party*, a defunct corporation, formerly operated by a brother of Mr. Kralis) was filed, demanding that the dismissal be vacated. However, plaintiffs twice failed, both in the motion and again after pointed objection to the motion, to allege or to prove that they had been duly diligent in seeking and furnishing the dated, incompetent and irrelevant information submitted. The district court deemed the motion legally ineffective.

The district court therefore refused to entertain the motion to decide it on its merits, finding:

> . . . [P]laintiffs, having inadequately dealt with the "due diligence" issue, are not entitled to judgment on their motion. Because the court makes this finding, it need not reach other of defendants' seemingly meritorious objections . . . thereto.

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5. The district court *pretermitted* considering whether the call involved *Mississippi* at all, petitioners having asserted that the federal building was in a "federal enclave" within the meaning of U.S. Const. Art. I, §8, cl.17. Since that issue was not decided it was not before the Court of Appeals.

Eighty-seven days after dismissal, Brown and Mott's appealed to the United States Court of Appeals for the Fifth Circuit. Petitioners moved to docket and dismiss the appeal as untimely and outside the court's jurisdiction. That motion was summarily denied in a one-line, unpublished order.

After allowing the appeal, the Court of Appeals reversed the district court, noting (1) that, by law, plaintiffs bear the responsibility of establishing jurisdiction over non-residents, and (2) that the defendants' affidavits controverting jurisdiction necessarily overcome the allegations of the complaint, but (3) that plaintiffs' affidavits control over defendants' affidavits *when there are conflicts between the two as to the specific jurisdictional facts alleged* in such affidavits. *Though no factual conflict about the nature of the call was presented in the two sets of affidavits,* the Court of Appeals concluded that plaintiffs had made the necessary *prima facie* factual showing, with affidavits wholly condemned by the district court as containing "mere *conclusions, unsupported by specific averments of fact.*"

And, though observing that petitioners' affidavits as to jurisdiction over Flowers in particular were "not adequately countered" by plaintiffs, nevertheless the Court of Appeals allowed the *unsupported allegations of the complaint to control over Flowers' proof* by documents and affidavits, reversing Flowers' dismissal.

The Court of Appeals implicitly assumed without any proof to support the assumption, that the denial of plaintiffs' $4,000,000.00 loan guarantee application was not simply an exercise of the wide discretion conferred by Congress upon the Executive Branch to administer the FmHA's Business and Industry Loan Program. In short, this

unwarranted assumption makes the federal government's presumptively correct refusal to guarantee a $4,000,000.00 loan to an ex-convict and his closely held corporation into an incident of "legal injury," antecedent to which the Court of Appeals has further assumed, for jurisdictional purposes, there must have been some wrongful, causative act, though plaintiffs failed utterly to offer the slightest factual proof from Mr. Hailman that the single long-distance telephone call to Mississippi was slanderous in quality and nature and amounted to such an act. The "phone call" cases relied on by the Court of Appeals are no authority for its reversal, since none of those decisions lack competent showings of the tortious quality and nature of the calls made.

REASONS FOR GRANTING THE WRIT

1. The Judgment Of The Court Of Appeals Conflicts Directly With Prior Decisions Of The Supreme Court Of The United States And The Supreme Court Of The State Of Mississippi.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980), this Court states that:

> . . . [F]*oreseeability* (of injury in the forum) *alone* has *never* been a sufficient bench mark for personal jurisdiction under the Due Process Clause.

(emphasis, parenthetical supplied). Yet the Fifth Circuit, after assuming *without proof* that the single contact with the forum by long-distance call was slanderous in nature and quality,[6] predicates jurisdiction upon the observation that:

> . . . The *injurious effect* of the tort, if one was committed, *fell in Mississippi*, which the *defendant could easily have foreseen.*

Appendix pp.22-23 (emphasis supplied). The Fifth Circuit then immediately fell to weighing the *forum non conveniens* considerations, again ignoring *World-Wide Volkswagen* which teaches:

> . . . Even if the defendant would suffer minimal or no inconvenience for being forced to litigate before the tribunals of another State, even if the forum State has a strong interest in applying its laws to the controversy; even if the forum State is the most convenient

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6. See discussion *infra* of cases requiring that "quality and nature" of the contact be addressed, especially when the contacts are few in number. A "one contact" case draws the "quality" issue into very sharp focus.

> location for litigation, the Due Process Clause, acting as an instrument of interstate federalism may sometimes act to divest the State of its power to render a valid judgment.

Id., at p.294.

Of course, in the instant case, the Fifth Circuit wrongly attributed to Mississippi a jurisdictional interest[7] in this long-distance alleged defamation which Mississippi itself, does not claim and has in decision repudiated. Appendix p.24. In *Breckenridge v. Time, Inc.*, 179 So.2d 781 (Miss. 1965), a defamation uttered outside Mississippi but published within the State was declared by the Mississippi Supreme Court to be beyond the reach of a court sitting in Mississippi, such an act not amounting to a purposeful invocation of the benefits of Mississippi law. The Fifth Circuit itself has remarked, in *Edwards v. Associated Press*, 512 F.2d 258, 262 (5th Cir. 1975), that irrespective of whether it is viewed as a due process case or as an interpretation of Mississippi's long-arm statute, *Breckenridge* showed that a defamation uttered from outside Mississippi was neither a purposeful availing of the benefits, etc. of Mississippi law nor within the long-arm jurisdiction of a Mississippi court. *Breckenridge* has not been overruled and is binding on the court below under *Erie*. The *Temco* case relied upon by the Court of Appeals is a products liability case, not on point, and implicitly overruled by *World-Wide Volkswagen*. See Appendix p.21.

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7. It being merely *fortuitous* that the U. S. Attorney investigating plaintiffs was situated in Oxford, Mississippi, rather than in Washington or elsewhere. Mississippi's *interest* seems particularly dubious when we observe that the caller was talking to a *federal* official, in a *federal* enclave, about the pendency of *federal* investigations of crimes in *international* commerce, possibly committed by applicants for a *federal* loan guarantee by the *federal* government, one of the applicants being a *federal* ex-convict.

Every personal jurisdiction—due process decision of the Supreme Court since *International Shoe* has stressed that the *quality and nature* of the non-resident's contacts with the forum are crucial in determining whether the assertion of personal jurisdiction will offend due process. *See, International Shoe Company v. State of Washington,* 326 U.S. 310, 319 (1945); *Hanson v. Denkla,* 357 U.S. 235, 253 (1958); *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977); *Kulko v. California Superior Court,* 436 U.S. 84, 97-98 (1978); *World-Wide Volkswagen, supra,* at p.297. Where the contacts are literally minimal, this consideration is paramount.

If the long-distance call is not shown *prima facie* to be of a slanderous nature, personal jurisdiction has to fail, yielding to due process. Indeed, the Mississippi long-arm process itself will fail if this fundamental proof that a tort was committed cannot be shown at least *prima facie.* Any other approach would negate the salutary purpose of Rule 12 to protect all non-residents from unwarranted impositions of personal jursidiction which violate due process.

It follows necessarily that, *since plaintiffs make no effort* to offer competent proof from the other party to the call as to the nature and quality of the defendant's long-distance conversation, plaintiffs can scarcely be said to have attempted or made the *prima facie* showing of tortious and therefore jurisdictional contact with the forum State. This is not an onerous burden for the plaintiff invoking jurisdiction on these facts since, if one cannot make even this modest *prima facie* showing in opposition to a motion to dismiss after nine months of litigation, what reasonable likelihood exists that plaintiff could have adduced any such testimony at trial?

2. The Opinion And Judgment Below Violate State Evidentiary Principles Which Are Controlling Under Erie And The Federal Rules Of Evidence.

In *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959), this Court announced that local rules of law, placing and defining the burden of proof and defining presumptions and their effect confer substantive rights which must be respected by federal courts under *Erie*. Rules 302 and 601, Federal Rules of Evidence, speak to or touch upon this principle.

A number of extant rules and presumptions arising under Mississippi law, all virtually ignored by the Fifth Circuit, militate for the reinstatement of the district court's dismissal. For instance, Mr. Kralis was required to go no further to rebut jurisdiction that to account for *his own* knowledge of the call. The burden to contradict that with Mr. Hailman's affidavit, if he were inclined to contradict, was placed upon plaintiffs. *Price v. Haney*, 164 So. 590 (Miss. 1935).

Further, though plaintiffs' complaint inferentially argues that U.S.D.A. *erred* in not granting their loan application, a strong positive presumption *to the contrary* arises under Mississippi and federal case decisions. *Martinson v. City of Jackson*, 215 So.2d 414 (Miss. 1968); *Norris v. United States*, 257 U.S. 77 (1921); *United States v. Chemical Foundation, Inc.*, 271 U.S. 1 (1926); *United States v. Rock Royal Cooperative*, 307 U.S. 533 (1939). Ironically, plaintiffs want to hold petitioners accountable to them *in Mississippi* for what the federal government decided *in Washington* to do about a loan guarantee application which only the Secretary of Agriculture or his deputy could authorize. Yet U.S.D.A. is not sued for the exercise of its executive power, though it alone is accountable for an arbitrary exercise of this power.

Moreover, though the Fifth Circuit is ready enough to assume *prima facie* that a slander was uttered, without the slightest proof to support that assumption, Mississippi law inveighs against that assumption and presumes at law that all persons, including non-residents, have: acted lawfully, *Mississippi Power Co. v. Sellers,* 133 So. 594 (Miss. 1931); in accordance with one's *legal duties, Wilkie v. Collins,* 48 Miss. 493 (1873); honestly and upon correct motives, *Wherry v. Latimer,* 103 Miss. 524 (1913); and have done right by others, not a wrong, *Orgill Bros. v. Perry,* 128 So. 755 (Miss. 1930).

This *prima facie* presumption of "right-doing" is not a foreign concept in this Court. *United States v. De la Maza Arredondo,* 31 U.S. (6 Pet.) 691 (1832); *Owings v. Hull,* 34 U.S. (9 Pet.) 607 (1835); *Mitchell v. United States,* 88 U.S. (21 Wall.) 350 (1874). There are no facts of record to which this presumption could yield.

Mr. Brown is conclusively presumed incompetent to give truthful testimony under state law, Miss. Code Ann. §13-1-11 (1972), and characteristically stooped to injecting positive falsehood into the proceedings below in the "Tupelo license" incident. Yet the Fifth Circuit has set great store by his affidavits, allowing his conclusions and speculations to overcome not only competent, uncontradicted affidavits on the material jurisdiction fact but *the very official documents whose content Brown affirmatively misrepresented.* Appendix p.21.

Clearly, the Fifth Circuit's judgment rewards falsehood and frustrates justice utterly. Plaintiffs showed no colorable claim to the long-arm jurisdiction of the district court. The federal and state "negative inference" rules speak directly to their failure to offer any proof showing that the one call to Mississippi was slanderous. We do not ask that the evidence opposing petitioners'

motion be reweighed; we maintain that the plaintiffs produced nothing which a court could accept as evidence and undertake to weigh.

3. The Decision Below Ignores The Absence Of A Prima Facie Showing Of Jurisdictional Fact And Negates The Salutary Purpose Of Fed.R.Civ.P. 12(b)(2).

The decision in *Texaco Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), observes that a "prima facie" case signifies having produced *enough evidence* to permit the trier of fact to infer the fact at issue. The fact at issue *in the pleadings* is whether a slander occurred in that single phone call. But on the proof adduced, *no issue appears* because defendants' affidavits establishing the innocent, inquisitive quality and nature of the call are not contradicted on that point.

While the law presumes that damage necessarily flows *from* a slander, the law has never presumed that an incident or an occurrence in time can be taken as a manifestation of legal injury so that an *unproven* act of wrongdoing may be retroactively inferred to have occurred and given rise to the "assumed injury." That kind of reasoning is implicit in a reversal of the district court upon the record there made.

The *denial* of plaintiff's loan application *by U.S.D.A.* may or may not be an incident of legal injury but if it is injury, still no proof to that effect appears of record. Is it not wholly indefensible for a court to assume first that the denial is an injury and then to assume that this one phone call to a remote office of a separate department of the federal government (which has nothing to do with approving U.S.D.A. loan applications) included an untrue

statement about the applicant's character and then to return circuitously to the "injury" with the additional assumption that the assumed slander *caused* the assumed injury? All of this is done by the Court of Appeals without the slightest evidentiary backing.

If a plaintiff can completely shirk his burden of material proof of jurisdiction contacts, or can carry that burden with conclusions, incompetent affidavits, and rank speculation about what two other people said to each other in a private phone call, and if a court will support this default in proof and join in by indulging impermissible assumptions, baseless inferences and ignoring the extant positive rules of law, what prospect has a nonresident of successfully defeating an improper assertion of jurisdiction over his person? Rule 12 defenses become meaningless words in such a climate.

A *prima facie* burden is the most modest of evidentiary thresholds. The due process protection afforded by the 14th Amendment should not be held susceptible to the indolence, prevarication, and illogic of a plaintiff who will not meet the burden fairly and address the single material fact which is crucial to the maintenance of jurisdiction.

4. The Decision To Allow The Appeal After Jurisdiction Over It Was Lost Conflicts Directly With A Prior Decision Of The Supreme Court.

In *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U.S. 131 (1937), Mr. Justice Roberts stated:

> . . . The granting of a rehearing is within the court's sound discretion, and *a refusal to entertain a motion therefor*, or the refusal of the motion, if entertained, *is not the subject of appeal. A defeated party who*

> *applies for a rehearing and does not appeal* from the judgment or decree *within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal.*

Id., at p. 137 (emphasis supplied).

In 1958, the Fifth Circuit, cited *Wayne United* on this point in *Ribaudo v. Citizens National Bank of Orlando*, 261 F.2d 929, 932, remarking:

> The key is that the court *must "entertain"* the petition, and this seems to be that it *must consider it on its merits*. . . . If it is so treated (entertained), the result (appealability being extended) is not altered by the fact that the decision on rehearing is the same as the initial order.

(Emphasis, parentheticals supplied).

The district court refused to entertain plaintiffs' application to rehear the dismissal motion or to decide the factual sufficiency of the "newly discovered evidence" to bring about a reversal of the original dismissal, because plaintiffs had twice failed to lay the due diligence legal and factual predicate for getting their new evidence considered. Appendix p.7. The merits of that evidence were not addressed by the district court and the import of those facts was not before the Court of Appeals after the appeal was allowed.

This refusal to entertain the Rule 59 motion kept the time within which to appeal from being tolled. Plaintiffs took the risk mentioned by Mr. Justice Roberts and lost.

To permit an appeal noticed 87 days after the order of dismissal, 57 days after plaintiffs had lost their right to appeal, was an impermissible extension of the limited

appellate jurisdiction vested in the courts of appeals. So wide a departure from the accepted and usual course of judicial proceedings to accept an untimely appeal calls for a corrective exercise of the supervisory power of the Supreme Court. Petitioners were deprived thereby of the salutary effect of the dismissal order.

5. The Decision Below Allowing The Untimely Appeal Conflicts With The Decisions Of Other Courts Of Appeals Concerning The Effect Of An Improperly Made Rule 59 Motion To Toll The Running Of The Time For Taking An Appeal.

Quite apart from the jurisdictional effect of the district court's *refusal to consider* plaintiffs' "newly discovered evidence" on its merits, there is an inherent, jurisdictional problem posed by allowing a *defectively made* Rule 59 motion to toll the running of appeal time. See Appendix pp.8-10. The Fifth Circuit had indicated previously that such motions were to have no tolling effect; allowing the plaintiffs' appeal marked a change of decision and principle now inconsistent with that held in other circuits. See Appendix p.11.

The Seventh Circuit opinion in *Fine v. Paramount Pictures, Inc.*, 181 F.2d 300 (7th Cir. 1950) holds that such motions are ineffective to extend the time for appeal and a legal nullity if the motion does not sufficiently state the ground upon which it depends.[8] The Fifth Circuit previously had relied upon *Fine* as controlling authority. *Virginia Land Co. v. Miami Shipbuilding Co.*, 201 F.2d 506 (5th Cir. 1953).

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8. The Fifth Circuit has customarily viewed the ground of "newly discovered evidence" as specifically requiring the predicate showing of movant's "due diligence." *See, e.g., Owens v. International Paper Co.*, 528 F.2d 606, 611 (5th Cir. 1976); *Lloyd v. Gill*, 406 F.2d 585, 587 (5th Cir. 1969).

The Tenth Circuit likewise holds that the stating of a ground *pro forma*, when moving to reopen, makes the motion so essentially defective as to deprive the district court of its discretionary jurisdiction even to entertain the motion. *Marshall's U.S. Auto Supply, Inc. v. Ashman*, 111 F.2d 140, 141-142 (10th Cir. 1940); *accord, National Farmers Union Automobile & Casualty Co. v. Wood*, 207 F.2d 659 (10th Cir. 1953).

On the other hand, the Ninth Circuit, now apparently joined by the Fifth, allows the appeal as long as the motion was timely filed, even if defectively made. *Yanow v. Weyerhauser S. S. Co.*, 274 F.2d 274 (9th Cir. 1959). And the Sixth Circuit pursues a literal approach to F.R.A.P. 4(a), likewise focusing upon the act of filing. *Keohane v. Swarco*, 320 F.2d 429 (6th Cir. 1963).

In an era of limited judicial resources, understaffed courts, and overloaded dockets, these conflicts become of greater importance. The unwarranted delaying of appeals, the haphazard presentation of ill-conceived attempts to disturb well-founded orders, and the tardy submission of dubious evidence do not contribute to an efficient, judicious administration of justice or the courts established to dispense it. Stretching the time within which to appeal, while litigants engage in unwarranted motions consumptive of court and private resources, serves no legitimate objective of the courts, the litigants, or the public. Rule 60, Fed.R.Civ.P., opens an avenue for post-judgment motions without interrupting the flow of appeal time. But Rule 59 should not be so abused.

6. The Decision Below Is Fundamentally Unfair In Subjecting A Corporate Agent To Personal Jurisdiction Amenability For Alleged Acts Done Solely On Behalf Of His Corporate Employer.

World-Wide Volkswagen, supra, holds that the root issue in due process inquiries is whether one may reason-

ably anticipate that his acts abroad may cause him to be haled into court in a distant forum. In the opinion below, the Fifth Circuit relies in part (Appendix p.20) upon *Marine Midland Bank v. Miller*, 664 F.2d 899 (2nd Cir. 1981) which holds, *inter alia*, that personal *liability* and personal jurisdiction *amenability* are not synonymous issues. The case notes that it may be fundamentally unfair to hold a corporate employee, like Mr. Kralis, personally amenable to long-arm process, where his acts arise from a faithful pursuit of his employer's interests, not his own, and where that corporation is not a "mere shell" such that the employee might properly be deemed to be acting in his own interest.

The record made below clearly established all of these elements in Mr. Kralis' favor. Though the record fails utterly to show wherein he did anything wrong, the record does show successfully that what he did do was as a salaried employee for his employer, an adequately capitalized, formally run entity in which Mr. Kralis had no stock ownership interest.

The traditional notions of fair play, to which *International Shoe* and its progeny pay tribute, are offended by the maintenance of personal jurisdiction over Mr. Kralis, compelling him to participate personally in litigation in distant Oxford, Mississippi.[9] A single innocent inquiry of a public officer on behalf of one's employer, made by a long-distance telephone call, is not such an act as one would reasonably expect to cause a corporate employee to be haled into Mississippi to answer and defend a baseless $81,000,000.00 suit.

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9. Though he was president of Kralis Bros. when suit commenced, Mr. Kralis retired as president of the company on December 31, 1982.

CONCLUSION

Petitioners pray respectfully that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit and that the Court simultaneously (1) summarily reverse the denial of petitioners' motion to docket and dismiss the appeal below as untimely and (2) reverse the judgment and opinion entered in the Court of Appeals as being insupportable upon the record or grant such other hearing and relief as the record requires.

Respectfully submitted,

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(Counsel of Record)
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South Congress
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Jackson, Mississippi 39205
(601) 969-7607
Counsel for Petitioners

January 18, 1983

APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. WC80-166-LS-P

PETE HARDIN BROWN and
MOTT'S INC. OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC.,
JERRY KRALIS, AND KRALIS
BROS. FOODS, INC.,
Defendants.

MEMORANDUM ORDER

The court has before it defendants' motion to dismiss for lack of jurisdiction over the person. Rule 12(b)(2), F. R. Civ. P. For the reasons set out below, the court finds that defendants' motion is well taken.

Plaintiffs Pete Harding Brown (Brown) and Mott's Inc. of Mississippi (Mott's) charge defendants with defamation, tortious interference with plaintiffs' business relationships, and violations of the Sherman Act, 15 U.S.C. §1, et seq.

Defendant Flowers Industries, Inc. (Flowers) is a Delaware corporation with its principal place of business in Thomasville, Georgia. Defendant Kralis Bros. Food, Inc. (Kralis Foods) is an Indiana corporation with its principal place of business in Mentone, Indiana. Defendant Jerome Kralis is an adult resident citizen of Mentone, Indiana, and is president of Kralis Foods.

Plaintiffs allege that on or about October 15, 1979, Jerome Kralis, acting as agent for Kralis Foods and Flowers, defamed plaintiffs during a long-distance telephone conversation placed in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi. Service of process was obtained through the Mississippi Secretary of State pursuant to §13-3-57, Miss. Code Ann. (1972).

Defendants have moved for dismissal on the grounds that the exercise of in personam jurisdiction by this court would violate defendants' right to due process under the Fourteenth Amendment. In support of their motion, defendants have filed affidavits which tend to establish the following facts.

I. FLOWERS INDUSTRIES, INC.

Flowers Industries, Inc., is a holding company, and its relationship to Kralis Foods is that of stockholder. Flowers is not qualified to do business in Mississippi, owns no property here, has no employees or agents here, and maintains no bank accounts or telephone listings here. It appears that Flowers has no contacts at all with Mississippi.

II. KRALIS BROS. FOODS, INC.

Likewise, Kralis Foods is not qualified to do business in Mississippi. Kralis Foods is in the business of buying

and slaughtering spent hens from commercial egg producers for processing and resale to the manufacturers of various food products. Kralis Foods has neither purchased spent hens in Mississippi nor sold its processed product to buyers in Mississippi. Kralis Foods maintains processing plants in Indiana and Illinois, and not in Mississippi. Kralis Foods has no employees or agents in Mississippi, and it owns no property or bank accounts here.

III. JEROME KRALIS

Jerome Kralis has never been a Mississippi resident, and he owns no property or bank accounts here. Jerome Kralis' only visit to Mississippi occurred over eleven years ago when he spent two days of his vacation in Mississippi.

In response to the affidavits filed by defendants, plaintiffs filed identical affidavits on behalf of Brown and Mott's. Plaintiffs' affidavits state that Flowers operates a retail outlet known as Flower's Thrift Shop located at 711 South Gloster Street, Tupelo, Mississippi. Other than this single specific statement of facts, all other statements regarding defendants' activities in Mississippi as set out in plaintiffs' affidavits are mere conclusions, unsupported by specific averments of fact.

The third affidavit of Frederick E. Cooper, filed by defendants in response to plaintiffs' affidavits described above, states that Flowers Thrift Shop, located at 711 South Gloster Street, Tupelo, Mississippi, is not owned by Flowers, but rather is owned by Hardin's Bakery, Inc., of Tuscaloosa, Alabama, a corporation in which Flowers owns stock. Defendants supplied documentary evidence, including an application for privilege license and a privilege tax license receipt, which support Cooper's statement by disclosing that Hardin Bakery was the applicant for the license

granted Flowers Thrift Shop, 711 South Gloster, Tupelo, Mississippi. Thus, plaintiffs have failed to prove that Defendants Flowers, Kralis Foods, and Jerome Kralis have purposefully availed themselves of any benefits, privileges, or protections afforded by the State of Mississippi.

In light of the facts set out above, defendants seek dismissal of this cause on the grounds that there exist no "minimum contacts" between any of the three defendants and Mississippi, the forum state, and, therefore, the exercise of in personam jurisdiction by this court would offend "traditional notions of fair play and substantial justice." We agree.

We assume, without deciding, that the telephone call placed by Jerome Kralis from his office in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi, was sufficient to come within the ambit of §13-3-57, Miss. Code Ann. (1972), and authorize service of process upon Jerome Kralis and perhaps Kralis Foods based upon commission of a tort in whole or in part in Mississippi. In addition to the requirements of §13-3-57, Miss. Code Ann. (1972), the Due Process Clause of the Fourteenth Amendment requires that the assertion of in personam jurisdiction over a nonresident be supported by certain "minimum contacts" between the nonresident and the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319, 90 L.Ed. 95. The determination of whether these "minimum contacts" exist is not susceptible to decision by some bright line formula, but necessarily re-

quires an evaluation of the facts and circumstances of each case on an individual basis.

Here, the *only* contact between any of the three defendants and the forum state consists of a single long-distance telephone call. Although the cause of action for which suit is brought arose from this converation, the court is unable to conclude that this single contact with Mississippi is sufficient to subject defendants to in personam jurisdiction here. The lack of regular, purposeful activity within Mississippi indicates that defendants have not purposefully availed themselves of the protection and benefits of Mississippi's laws. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980).

In light of all the circumstances, the court is of the opinion that requiring defendants to defend an in personam action in Mississippi would offend traditional notions of fair play and substantial justice. Defendants' motion will be granted.

Accordingly, it is

ORDERED:

That defendants' motion to dismiss for lack of in personam jurisdiction is hereby GRANTED.

That this cause is hereby dismissed without prejudice.

SO ORDERED this 27th day of July, 1981.

/s/ L. J. Senter, Jr.
United States District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION
OXFORD, MISSISSIPPI

July 29, 1981

NO. WC80-166-LS-P

PETE HARDING BROWN and MOTT'S INC. OF MISSISSIPPI

vs.

FLOWERS INDUSTRIES, INC., JERRY KARALIS and KRALIS BROS. FOODS, INC.

MEMORANDUM

TAKE NOTICE that ORDER granting defendants' motion to dismiss for lack of in personam jurisdiction and dismissing cause without prejudice signed by Judge Senter on July 27, 1981, has been entered in Civil Order Book # 34, pages 279-280.

Norman L. Gillespie, Clerk
By: /s/ Sherry J. Hunter
Sherry J. Hunter,
Deputy Clerk

TO:

Hon. John L. Bailey
Hon. Jackson H. Ables, III

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. WC 80-166-LS-P

PETE HARDIN BROWN and MOTT'S, INC.
OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC., et al.,
Defendants.

ORDER

The court has before it plaintiffs' motion under Rule 59, F. R. Civ. P., to reconsider its order entered July 27, 1981, dismissing this cause for lack of in personam jurisdiction. The court has reviewed the voluminous documentary evidence submitted in support of plaintiffs' motion and in opposition thereto and is of the opinion that plaintiffs, having inadequately dealt with the "due diligence" issue, are not entitled to judgment on their motion. Because the court makes this finding, it need not reach other of defendants' seemingly meritorious objections and plaintiffs' responses thereto.

Accordingly, it is

ORDERED:

That plaintiffs' motion to vacate the court's order of July 27, 1981, is hereby DENIED.

This 19th day of October, 1981.

/s/ L. J. Senter, Jr.
United States District Judge

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4451

PETE HARDING BROWN AND MOTT'S INC.
OF MISSISSIPPI
Appellants

versus

FLOWERS INDUSTRIES, INC., JERRY KRALIS,
AND KRALIS BROS. FOODS, INC.
Appellees

MOTION TO DOCKET THE APPEAL AND TO DISMISS

COME NOW Flowers Industries, Inc., Jerome G. Kralis, and Kralis Bros. Foods, Inc., appellees-movants, by counsel, and move respectfully that this Court docket the appeal and enter its Order dismissing same upon the following ground:

The appeal is not timely because:

(a) The order appealed from, dated July 27, 1981, was entered of record on July 29, 1981.

(b) The appellants' notice of appeal was not filed until October 23, 1981, more than eighty-seven days after entry of the order appealed from, in violation of Rule 4(a), Federal Rules of Appellate Procedure.

(c) The appellants' Rule 59(e) motion filed August 5, 1981, to vacate the order of dismissal (dated July 27, 1981), though perhaps timely, was not properly made under

Fed. R. Civ. P., 7, 8, 9, 11 and 59 and did not terminate the running of the time for filing a notice of appeal, in that:

(1) the appellants failed on at least two separate occasions of opportunity to make the necessary showing to the district court of "due diligence" on their part, a necessary predicate and a condition precedent to seeking the Court's alteration or amendment of the order of July 27, 1981, upon the asserted ground of "newly discovered evidence";

(2) appellants did not state to the district court with particularity the grounds for their motion to vacate, as required by Fed. R. Civ. P., 7(b);

(3) appellants did not proffer any "newly discovered evidence" to substantiate such allegations as their motion vaguely made;

The motion was therefore improper and a nullity to toll the appeal time.

(d) The district court's separate order of October 9, 1981, denying the motion to vacate, is not appealable as such and the notice of appeal is consequently invalid as and to the extent that it complains of such order, in that:

(1) the order of October 9, 1981, is one of a nature from which an appeal does not lie;

(2) though the order is not appealable, neither is that an order reviewable for an abuse of discretion by the district court;

(3) review of any Rule 59 ruling is limited to inquiry into an abuse of discretion by the district court;

(4) the district court had no discretion as a matter of law to entertain the Rule 59(e) motion because it was improperly made, thus there is no discretionary conduct for appellants to complain of or for the Court of Appeals to review.

(e) The appeal is a frivolous attempt to relitigate in this Court the motion to vacate, as the Brief for Appellants undeniably shows.

WHEREFORE, appellants having failed to perfect their appeal within the time required by law and having otherwise failed to take such actions under the Rules as would properly suspend the running of the time within which to file their notice of appeal, the appeal is untimely and this Court has no jurisdiction of it. The appellees pray respectfully that the appeal be docketed and that this Honorable Court order the same dismissed, at the cost of appellants.

Respectfully submitted,

Flowers Industries, Inc., Jerry Kralis and Kralis Bros. Foods, Inc., Appellees

/s/ Jackson H. Ables, III
Of Counsel

Daniel, Coker, Horton and Bell, P.A.
Post Office Box 1084
Jackson, Mississippi 39205
(601) 969-7607

CERTIFICATE

I, Jackson H. Ables, III, of counsel for appellees, do hereby certify that I have this day, via United States Postal Service, postage paid, mailed a true and correct copy of the above and foregoing Motion to Docket the Appeal and to Dismiss to Charles C. Finch, Esq., P. O. Drawer 568, Batesville, Mississippi 38606.

This, the 11th day of January, 1982.

/s/ Jackson H. Ables, III
Jackson H. Ables, III

APPENDIX "E"

(Filed February 10, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4451

PETE HARDING BROWN and MOTT'S
INC OF MISSISSIPPI,
Plaintiffs-Appellants,

versus

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
JERRY KRALIS and KRALIS BROTHERS FOOD, INC.,
An Indiana Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss appeal is denied.

/s/ Illegible

APPENDIX "F"

Pete Harding BROWN and Mott's Inc.
of Mississippi, Plaintiffs-Appellants,

v.

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
Jerry Kralis, and Kralis Brothers Foods, Inc.,
An Indiana Corporation,
Defendants-Appellees.

No. 81-4451.

United States Court of Appeals,
Fifth Circuit.
Sept. 22, 1982.

Suit was dismissed by the United States District Court for the Northern District of Mississippi at Oxford, L.J. Senter, Jr., J., on ground of lack of personal jurisdiction. Plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that where individual nonresident defendant initiated telephone call to Mississippi and allegedly committed intentional tort, and injurious effect of tort, if one was committed, fell in Mississippi, which defendant could easily have foreseen, and where injury was felt entirely by Mississippi resident and Mississippi corporation and where only two witnesses likely to be called as to content of telephone call included such nonresident defendant and a resident of Mississippi, and all witnesses to effect of call resided in Mississippi, due process clause did not preclude personal jurisdiction over nonresident defendants.

Reversed and remanded.

1. Federal Courts (Key) 281

Diversity jurisdiction permits nonresident to seek federal forum to avoid partisanship that state courts might show for their own citizens, but also permits resort to federal court even by residents of forum state to assert claim against nonresident for relief that state court could afford. 28 U.S.C.A. § 1332.

2. Constitutional Law (Key) 305(5)

Federal Courts (Key) 76, 417

In diversity action, federal court enjoys jurisdiction over nonresident defendant to extent permitted by long-arm statute of forum state, but defendant must be amenable to suit under statute, which is requirement that is by law of forum state, and assertion of jurisdiction over defendant must be consistent with due process clause of Fourteenth Amendment, which is requirement controlled by federal law. Fed. Rules Civ. Proc. Rule 4(d)(7), (e), 28 U.S.C.A. § 1332; Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amend. 14.

3. Courts (Key) 12(2)

The "minimum contacts" test of jurisdiction applies to individuals as well as to corporations, and Mississippi long-arm statute applies to the individual as well as to corporate defendants. Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amend. 14.

4. Federal Courts (Key) 34

Party invoking jurisdiction of federal court bears burden of establishing jurisdiction over nonresident defendant. Miss. Code 1972, § 13-3-57; 28 U.S.C.A. § 1332.

5. Federal Courts (Key) 34

Where federal district court decided defendants' motion to dismiss, for lack of jurisdiction, solely on basis of

affidavits, plaintiffs were required only to present prima facie case for personal jurisdiction. 28 U.S.C.A. § 1332; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

6. Federal Civil Procedure (Key) 1829

On motion to dismiss for lack of personal jurisdiction, allegations of complaint, except as controverted by defendants' affidavits, must be taken as true. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

7. Federal Courts (Key) 34

On motion to dismiss for lack of personal jurisdiction, conflicts between some facts alleged by plaintiffs and those alleged by defendants in their affidavit would be resolved in plaintiffs' favor for purposes of determining whether prima facie case for in personam jurisdiction had been established. 28 U.S.C.A. § 1332; Miss. Code 1972, § 13-3-57; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

8. Courts (Key) 12(2)

Though personal jurisdiction was predicated on one long-distance telephone call that was alleged to constitute tort committed "in whole or in part" in Mississippi, telephone call, by which it was alleged that a defendant defamed plaintiffs and caused them injury in Mississippi, came within ambit of Mississippi long-arm statute. Miss. Code 1972, § 13-3-57.

9. Courts (Key) 12(2)

Both by its language and by interpretation, Mississippi long-arm statute includes in its reach defendants who commit single tort, and it is not necessary that alleged tortfeasor have been present in state if he causes injury in Mississippi. Miss. Code 1972, § 13-3-57; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

10. Constitutional Law (Key) 305(5)

Courts (Key) 12(2)

Number of contacts with forum state is not by itself determinative as to whether due process clause permits subjecting nonresident defendants to in personam jurisdiction, and what is more significant is whether contacts suggest that nonresident defendant purposefully availed himself of benefits of forum state. Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amends. 5, 14.

11. Constitutional Law (Key) 305(5)

Courts (Key) 12(2)

Two factors revelant in determining whether court's exercise of personal jurisdiction comports with due process are interest of state in providing forum for the suit and relative conveniences and inconveniences to the parties. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 14.

12. Constitutional Law (Key) 305(5)

Federal Courts (Key) 76

Where individual nonresident defendant initiated telephone call to Mississippi and allegedly committed intentional tort, and injurious effect of tort, if one was committed, fell in Mississippi, which defendant could easily have foreseen, and where injury was felt entirely by Mississippi resident and Mississippi corporation and where only two witnesses likely to be called as to content of telephone call included such nonresident defendant and a resident of Mississippi, and all witnesses to effect of call resided in Mississippi, due process clause did not preclude personal jurisdiction over nonresident defendants. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 14; Miss. Code 1972, § 13-3-57.

Appeal from the United States District Court for the Northern District of Mississippi.

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This suit was dismissed by the district court for want of jurisdiction on the basis that due process would be denied by assuming jurisdiction over a nonresident defendant whose sole contact with the forum state was the making of a single defamatory telephone call to a person in that state. Concluding that, under the facts presented, due process permits invocation of jurisdiction over a nonresident who commits in whole or in part a single tort in a state, we reverse.

I

[1] Seeking the benefit of diversity jurisdiction, 28 U.S.C. § 1332 (1976), which permits a resident of the forum state to resort to federal court to assert a claim against a nonresident for relief that a state court afford,[1] Pete Harding Brown, a Mississippi resident, and Mott's Inc. of Mississippi, a Mississippi corporation with its principal place of business in Mississippi, sued Flowers Industries, Inc. ("Flowers"), a Delaware corporation with its principal place of business in Georgia; Kralis Brothers Foods, Inc.

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1. Diversity jurisdiction permits a nonresident to seek a federal forum to avoid the partisanship that state courts might show for their own citizens. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599, 15 L.Ed. 518, 520 (1856); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). The diversity statute, however, permits resort to federal court even by a resident, who would presumably have nothing to fear from the processes of a state forum when suing a nonresident. *E.g., Smith v. Metropolitan Property & Liab. Ins. Co.*, 629 F.2d 757, 761 n. 7 (2d Cir. 1980).

("Kralis Brothers"), an Indiana corporation with its principal place of business in Indiana; and Jerry Kralis ("Kralis"), an Indiana resident and president of Kralis Brothers. None of the defendants is qualified to do business in Mississippi.

The plaintiffs alleged that the defendants conspired to and did cause them economic and other injuries, and, although relying on diversity jurisdiction, that the defendants also violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, and the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a. This was accomplished, they contend, in October 1979 when Kralis made a defamatory telephone call from Indiana to the United States Attorney in Oxford, Mississippi. The plaintiffs allege that the conspiracy and telephone call caused them to lose the chance to obtain a $4 million loan from the Farmers Home Administration.

Service of process was made under the Mississippi longarm statute, Miss. Code Ann. § 13-3-57 (Cum. Supp. 1981).[2] The defendants moved to dismiss the action for

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2. Section 13-3-57 provides:

SERVICE WHEN DEFENDANT IS NONRESIDENT DOING BUSINESS IN STATE—APPOINTMENT OF SECRETARY OF STATE AS AGENT.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall . . . commit a tort in whole or in part in this state against a resident or nonresident of this state . . . shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such . . . tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

. . . .

(Continued on following page)

lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). This motion was granted by the district court based on its findings that (1) Flowers had "no contacts at all with Mississippi"; (2) Kralis Brothers had neither purchased nor sold products in Mississippi, and had no employees or agents there; and (3) Kralis had no contacts with Mississippi other than the October 1979 telephone call he made to the United States Attorney in Mississippi and a two-day visit to the state more than twelve years ago. The district court reasoned: "We assume, without deciding, that the telephone call placed by Jerome Kralis from his office in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi, was sufficient to come within the ambit of § 13-3-57, . . . and authorize service of process upon [Kralis] and perhaps [Kralis Brothers] based upon commission of a tort in whole or in part in Mississippi . . . . [T]he court is unable to conclude that this single contact with Mississippi is sufficient to subject defendants to in personam jurisdiction there."

Footnote continued—

> The . . . committing of such tort in this state, shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country.
>
> Service of any process herein provided for to be made upon the secretary of state shall be made in like manner and procedure, inclusive of notice of service, and with the same force and effect, as is provided by law for service on nonresident motorist defendants under [Miss. Code Ann.] section 13-3-63, provided, however, that service of process may be had in any county of the state where the defendants, or any of them, may be found.
>
> The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

The defendants admit that Kralis made the telephone call although they dispute the plaintiffs' contention that the message was defamatory. They also admit he was acting as an officer of Kralis Brothers but they deny he was an agent or employee of Flowers. They submitted affidavits, not adequately countered, saying that, although Flowers is a holding company that owns stock in Kralis Brothers, Kralis is neither an officer nor an employee of Flowers and was not acting as an agent of Flowers when he made the telephone call.

II

[2, 3] In a diversity action a federal court enjoys jurisdiction over a nonresident defendant to the extent permitted by the long-arm statute of the forum state. *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 485-86 (5th Cir. 1982); *Moore v. Lindsey*, 662 F.2d 354, 357-58 (5th Cir. 1981); Fed. R. Civ. P. 4(d)(7), (e); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1115, at 470 (1969). Two tests must be met before a state statute can confer jurisdiction over a nonresident defendant. First, the defendant must be amenable to service under the statute,[3] a requirement that is by the law of the forum state.[4] Second, assertion of jurisdiction over the defendant must be consistent with the due process clause of the fourteenth amendment,[5] a requirement that is controlled by federal

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3. *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.41-1[3], at 4-443 (2d ed. 1982).

4. *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 401 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1975, 72 L.Ed.2d 443 (1982); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075, at 313, 316 (1969).

5. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 196 (5th Cir. 1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 (5th Cir. 1974); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.41-1[3], at 4-446 (2d ed. 1982).

law.[6] Due process requires that a nonresident defendant have "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and effective justice,' "[7] or that he perform some act "by which [he] purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"[8] before the forum may extend its long-arm to embrace him.[9]

[4-6] The party invoking the jurisdiction of a federal court bears the burden of establishing the court's jurisdiction over a nonresident defendant. *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980) (per curiam); *Thorington v. Cash*, 494 F.2d 582, 584 n. 4 (5th Cir. 1974). Because the district court decided the defendants' motion solely on the basis of affidavits, the plaintiffs were required only to present a prima facie case for personal jurisdiction. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977).[10]

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6. *Terry v. Raymond Int'l, Inc.*, 658 F.2d at 401; *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075, at 316 (1969).

7. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 101 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940)).

8. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1297 (1958).

9. The "minimum contacts" test applies to individuals as well as to corporations. *Caiagaz v. Calhoun*, 309 F.2d 248, 254-55 (5th Cir. 1962); *San Juan Hotel Corp. v. Lefkowitz*, 277 F.Supp. 28, 30 (D.P.R. 1967); *see Kulko v. Superior Ct.*, 436 U.S. 84, 91-92, 98 S.Ct. 1690, 1696-97, 56 L.Ed.2d 132, 140-141 (1978). Likewise the Mississippi long-arm statute applies to individual as well as to corporate defendants. *Alford v. Whitsel*, 322 F.Supp. 358, 361 (N.D. Miss. 1971).

10. *See Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d at 1232.

On a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint, except as controverted by the defendants' affidavits, must be taken as true. *E.g., Black v. Acme Mkts., Inc.*, 564 F.2d 681, 683 n. 3 (5th Cir. 1977).

[7] In this case jurisdiction was predicated on one long-distance telephone call that was alleged to constitute a tort committed "in whole or in part" in Mississippi. The plaintiffs carried their burden of establishing jurisdiction by alleging in their complaint and affidavits facts to support their claim that Kralis defamed them and caused them injury in Mississippi. Although there are conflicts between some of the facts alleged by the plaintiffs and these alleged by the defendants in their affidavits, such conflicts "must be resolved in plaintiff[s'] favor for purposes of determining whether a prima facie case for *in personam* jurisdiction has been established." *United States Ry. Equip. Co. v. Port Huron & Detroit R.R.*, 495 F.2d 1127, 1128 (7th Cir. 1974).

[8, 9] The Mississippi long-arm statute, *supra* note 2, provides: "Any nonresident person . . . who shall . . . commit a tort in whole or in part in this state against a resident . . . of this state . . . shall by such act or acts be deemed to be doing business in Mississippi." The district court assumed, without deciding, that Kralis's telephone call came within the ambit of the Mississippi statute. This assumption was warranted. Both by its language and by interpretation[11] the statute includes in its reach defendants who commit a single tort. An alleged tortfeasor need not have been present in the state. If, as is alleged in this case, he causes injury in Mississippi, he is covered by the statute. *Smith v. Temco, Inc.*, 252 So.2d 212, 216 (Miss.1971). Thus this case resembles other cases in which courts have

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11. *See Alford v. Whitsel*, 322 F.Supp. at 362.

held that conduct like Kralis's is covered by long-arm statutes similar to the Mississippi statute.[12]

[10] The district court erroneously concluded, however, that this one contact was insufficient under the due process clause to subject the defendants to *in personam* jurisdiction. The number of contacts with the forum state is not, by itself, determinative. *Quasha v. Shale Dev. Corp.*, 667 F.2d at 488; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495 (5th Cir. 1974).[13] What is more significant is whether the contacts suggest that the nonresident defendant purposefully availed himself of the benefits of the forum state. *Quasha v. Shale Dev. Corp.*, 667 F.2d at 488.[14]

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12. *See, e.g., State ex rel. Advanced Dictating Supply, Inc. v. Dale*, 269 Or. 242, 246-48, 524 P.2d 1404, 1406-07 (1974) (Oregon law) (out-of-state defendant's single defamatory telephone conversation conferred jurisdiction); *Myers v. John Deere Ltd.*, 683 F.2d 270, 271-72 (8th Cir. 1982) (North Dakota law); *National Egg Co. v. Bank Leumi le-Israel B.M.*, 504 F.Supp. 305, 309-12 (N.D. Ga. 1980) (Georgia law); *J.E.M. Corp. v. McClellan*, 462 F.Supp. 1246, 1247 (D. Kan. 1978) (Kansas law); *cf. Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) ("Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."). *See generally Margoles v. Johns*, 483 F.2d 1212, 1216 (D.C. Cir. 1973) ("Statutes which [like Mississippi's] predicate jurisdiction over a non-resident upon the commission of 'a tort in whole or in part' within the jurisdiction . . . are broadly construed.").

13. *See Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723, 726 (5th Cir.) ("very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement"), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973); *cf. In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972) ("A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents.").

14. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980) ("[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.").

"When a defendant purposefully avails himself of the benefits and protection of the forum's laws—by engaging in activity . . . outside the state that bears reasonably foreseeable consequences in the state—maintenance of the law suit does not offend traditional notions of fair play and substantial justice." *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982) (citation omitted). In addition to the existence of foreseeable consequences, courts consider " the quantity of contacts, and the source and connection of the cause of action with those contacts" in determining whether a defendant's actions constitute "purposeful availment." *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494 n. 17 (5th Cir. 1974). *Accord Standard Fittings Co. v. Sapang, S.A.*, 625 F.2d 630, 643 (1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981).

[11] Two other factors are also relevant in determining whether the exercise of personal jurisdiction comports with due process. The first is "the interest of the state in providing a forum for the suit." *Austin v. North American Forest Products, Inc.*, 656 F.2d 1076, 1090 (5th Cir. 1981); *Products Promotions, supra*, 495 F.2d at 498. Finally, the "relative conveniences and inconveniences to the parties" are also relevant. *Austin, supra*, 656 F.2d at 1090; *Products Promotions, supra*, 495 F.2d at 495.

[12] These considerations lead us to conclude that the defendants are not denied due process by being subjected to suit in Mississippi. Kralis initiated the telephone call[15] and allegedly committed an intentional tort.[16] The

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15. *Compare Cook Assocs., Inc. v. Colonial Broach & Mach. Co.*, 14 Ill.App.3d 965, 970, 304 N.E.2d 27, 31 (1973) ("[It] was defendant . . . who initiated the business transaction in question by telephoning plaintiff . . . .") *with McBreen v. Beech Aircraft Corp.*, 543 F.2d 26, 31 (7th Cir. 1976) ("The sole contact between

(Continued on following page)

injurious effect of the tort, if one was committed, fell in Mississippi, which the defendant could easily have foreseen. *Rusack v. Harsha*, 470 F.Supp. 285, 291 (M.D. Pa. 1978). The injury was felt entirely by a Mississippi resident and a Mississippi corporation. Forcing them to travel to Indiana to litigate would not advance "[their] interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, 498 (1980). There are only two witnesses likely to be called with regard to the content of the telephone call: one of them, the United States Attorney, resides in Mississippi; the other is, of course, Kralis. All of the witnesses to the effect of the call reside in Mississippi. *See Rusack v. Harsha*, 470 F.Supp. at 291; *cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947) (forum non conveniens).

We intimate no opinion concerning the sufficiency of the evidence against the defendants to survive a motion for summary judgment. That issue, like many others lurking in the case, may be presented to the district court now that its jurisdiction is established.

The judgment of dismissal is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

Footnote continued—

defendant . . . and the forum in this case consisted of remarks made during a telephone call which was neither solicited nor initiated by the defendant.").

16. "[W]hether an act is intentional or negligent can have a distinct bearing on whether the exercise of jurisdiction thereover is constitutional, for it goes directly to fairness and the degree to which an individual has purposefully availed himself of the privilege of conducting activities within the forum state." *Margoles v. Johns*, 483 F.2d at 1220; *see Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1110 & n. 5 (5th Cir. 1976); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d at 664.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4451

PETE HARDING BROWN and MOTT'S
INC OF MISSISSIPPI,
Plaintiffs-Appellants,

versus

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
JERRY KRALIS and KRALIS BROTHERS FOOD,
INC., An Indiana Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/22/82, 5 Cir., 198...., ... F.2d .....).
(October 22, 1982)

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local

Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Alvin B. Rubin
United States Circuit Judge

CLERK'S NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. WC80-166-LS-P

PETE HARDIN BROWN AND MOTT'S, INC.,
OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC., et al.,
Defendants.

ORDER

For good cause shown and upon defendants' motion for a stay of proceedings pending consideration of defendants' petition to the Supreme Court for a writ of certiorari directed to the Fifth Circuit Court of Appeals,

IT IS ORDERED:

That this cause be and is hereby STAYED pending the consideration by the United States Supreme Court of defendants' certiorari petition.

This 17th day of December, 1982.

/s/ L. J. Senter, Jr.
United States District Judge

No. 82-1218

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FLOWERS INDUSTRIES, INC., JERRY KRALIS, and KRALIS BROS. FOODS, INC.,
Petitioners,

v.

PETE HARDING BROWN AND MOTT'S, INC. OF MISSISSIPPI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

v.

PETE HARDING BROWN AND MOTT'S, INC. OF MISSISSIPPI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Pete Harding Brown and Mott's, Inc. of Mississippi, respectfully request that this Court deny the petition for the writ of certiorari, seeking review of the decisions of the Court of Appeals for the Fifth Circuit to hear the appeal and to reverse and remand this case. The opinion is reported at 688 F.2d 328.

STATEMENT OF THE CASE

Respondents, Pete Harding Brown and Mott's, Inc. of Mississippi, filed a Complaint against Flowers Industries, Inc., Kralis Bros. Foods, Inc., and Jerry Kralis on December 15, 1980, in the United States District Court for the Northern District of Mississippi. The respondents sought damages for the tortious conduct of the petitioners in

conspiring together to and in causing economic injury to respondents by making false and defamatory statements to the U.S. Attorney in Oxford, Mississippi,[1] by maliciously interfering with respondents' business relationships, by causing a Four Million Dollar loan to respondents from the United States Farmers Home Administration to be stopped, and by violating the Sherman Act, 15 U.S.C. § 1, et. seq.

Service of process was made pursuant to the Mississippi long-arm statute—MISS. CODE ANN. § 13-3-57 (1972). The petitioners answered and moved for dismissal for lack of in personam jurisdiction.

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[1] Contrary to petitioners' representation that the record does not contradict their assertion that Mr. Kralis only made lawful inquiry of the U.S. Attorney (p. 4 of Petition), the following recount of Mr. Kralis' slander is set forth in the Complaint and is uncontradicted by any of petitioners' affidavits:

> The Defendant, Kralis, . . . made the following statement to the U.S. Attorney's Office at Oxford, Mississippi:
>
> 'That the Plaintiffs, PETE HARDING BROWN and MOTT'S INC. OF MISSISSIPPI, selected as consultants, Jack Frost and Company, Certified Public Accountants of Little Rock, Arkansas, which said CPA firm is the CPA for Lane Poultry, and that Lane Poultry was a major supplier of the Plaintiffs, PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI, and was, therefore, unable to make an impartial study of the economic impact of the loan.'
>
> The Defendant, Kralis, further stated and published that the loan application made by the Plaintiffs, PETE HARDING BROWN and MOTTS' INC. OF MISSISSIPPI.
>
> '. . . is false because Lane Processing, G.W. Nichols, and Valmac, were listed as competitors of Mott, Inc. of Mississippi when in fact they are creditors of Brown and Mott Inc. of Mississippi.'
>
> The Defendant, Kralis, also stated and published that:
> '. . . it was common knowledge in the industry that Brown was being investigated for selling bad chickens to Saudi Arabia under false pretenses, which was bad for the industry.'
> That all of the statements listed above are false and untrue . . . .

Affidavits in support of the motion to dismiss were filed by petitioners.[2] Affidavits in response to the motion were filed by respondents. The District Court issued its Memorandum Order dismissing this cause without prejudice for lack of in personam jurisdiction on July 27, 1981. This order was entered on July 29, 1981.

On August 5, 1981, respondents filed and served a Rule 59(e) Motion to vacate the order of dismissal on the following multiple grounds: (1) on the ground of newly discovered evidence showing additional contacts by the [petitioners] with the State of Mississippi; (2) on the ground that [petitioners'] affidavits had contained misrepresentations; (3) on the ground that the dismissal had been procured by the misconduct of a party; (4) and on the ground that the District Court had made an error of law in construing the effect of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Respondents also filed affidavits in support of the motion. Petitioners responded and filed affidavits. Respondents filed additional affidavits. The District Court issued its Order denying respondents' motion on October 19, 1981. This order was entered on October 21, 1981. The notice of appeal was filed on October 23, 1981, two days after entry of the order.

Petitioners moved to docket and dismiss the appeal, arguing that the Rule 59(e) motion was a nullity and hence did not terminate the running of time for filing the notice of appeal. The Court of Appeals summarily dismissed petitioner's motion.

Concluding that respondents had carried their burden of establishing jurisdiction by alleging in their complaint and affidavits facts to support injury to them in Missis-

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[2] Petitioners' affidavits on the question of commission of a tort in whole or in part in Mississippi specifically state only that they did not "enter the State of Mississippi and there do any of the things charged . . . ."

sippi caused by petitioners' intentional tort, the Court of Appeals reversed and remanded the case.

REASONS WHY THE WRIT SHOULD BE DENIED

Since this case involves only two real questions, both of which were decided by the Court of Appeals in accordance with settled law, clearly established by this Court and consistent with all other circuits, the writ should be denied.

The first question is whether a Rule 59(e) motion timely filed and alleging numerous grounds with supporting affidavits stops the running of time for appeal. The answer is clearly yes. *See, United States Labor Party v. Oremus*, 619 F.2d 683, 687 (7th Cir. 1980) (Note that this is the same circuit which decided the *Fine* case erroneously relied upon by petitioners at page 18 of Petition.)

The second question is whether personal jurisdiction may be asserted over alleged tort feasors who have intentionally caused tortious injury in the forum state. The answer is clearly yes. When a tort feasor does an act for the purpose of causing injury in the forum state, the foreseeability critical to due process is certainly established. This Court has made clear that "the foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). One who intentionally causes injury in Mississippi should, of course, reasonably anticipate being haled into court there. Therefore, the Court of Appeals correctly concluded that the petitioners' intentional tort causing injury in Mississippi satisfied this Court's foreseeability requirement.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1218

In the Supreme Court of the United States

October Term, 1982

FLOWERS INDUSTRIES, INC., JERRY KRALIS, AND KRALIS BROS. FOODS, INC.,
Petitioners,

vs.

PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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TABLE OF AUTHORITIES

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vs.

PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

The respondents never attempted and thus failed to make a *prima facie* showing of actionable conduct or contact with the forum. This state of things militates for summary reversal. However, respondents pretend that there is evidentiary support in the record for the assertion of jurisdiction. That is not so.

The unsubstantiated complaint, unsupported by affidavits, leaves one with at least the *doubt* of jurisdiction if not a required *legal presumption* that jurisdictional facts do not exist since respondents have not put them into the record after nine months of litigation.

This Court and the Supreme Court of Mississippi have both stated that where so much as a *doubt* of jurisdiction

is present *due process requires that the doubt be resolved against the existence of jurisdiction.*

In *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977), the Court declared:

> . . . [W]*hen the existence of jurisdiction* in a particular forum under International Shoe is *unclear*, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." *That cost is too high.*

The highest court in the forum State espoused the same attitude six years earlier in *Kaiser Co. v. Ludlow*, 243 So.2d 62, 67 (Miss. 1971):

> . . . In applying the so called long-arm statute the court should be sensitive to *any* conflict between letter of the law and traditional notions of fair play and substantial justice, and *if the latter is offended, the former may have to yield.*

It should have been perfectly clear upon the record made below that jurisdiction in the forum did not exist. The district court so concluded after finding that respondents had offered *no* proof to support jurisdiction. The Court of Appeals, however, faced with this same record purported to find within this *evidentiary vacuum* conflicting "facts" or something that made the existence of jurisdiction "unclear."

Rather than follow *Shaffer v. Heitner*, rather than acknowledge *Kaiser Co. v. Ludlow*, the Court of Appeals ignored the record deficit and deferred to an unsubstantiated complaint. That ruling puts no value at all upon the due process protection secured to the petitioners by the Constitution.

If the record *were* beclouded with the conflicting facts suggested by the Court of Appeals, the court's resolution

of such a conflict would yet be of doubtful legality in light of *Shaffer, supra.* But where the court pretends to resolve non-existent evidentiary conflicts and jurisdictional doubt upon dubious legal authority, the result obtained is unconscionable.

The mind-set which adopted this approach is unmasked in the Court of Appeals' outright misquote from *International Shoe.* They have transformed "fair play and *substantial* justice" to read "fair play and *effective* justice." *Id.*, 326 U.S. 310, 316 (1945). A want of *substance* in respondents' proof is excused as necessary to secure the *effect* respondents desired—an insupportable assertion of jurisdiction.

The respondents' short brief in opposition does not respond to the vast majority of petitioners' reasons for granting the writ. The brief response cites only two cases, neither of which supports respondents' opposition to the petition but both of which corroborate petitioners' case for review.

United States Labor Party v. Oremus, 619 F.2d 683, 687 (7th Cir. 1980), does not conflict, as suggested, with *Fine v. Paramount Pictures, Inc.* Rather it meshes; in *Oremus,* the Court found:

> . . . Since plaintiffs filed a *proper* Rule 59(e) motion *within* ten days . . . we have jurisdiction of the appeal.

(Emphasis added). Timeliness and legal sufficiency are distinct criteria. *Both* must be met.

The Court will recall that the district court below has specifically found that respondents' Rule 59(e) motion, though perhaps timely, was *not proper* and he expressly declined to entertain it for that reason. *Fine* is unscathed and *Oremus* will not resuscitate respondents' appeal time. But that aside, respondents have ignored or failed to ad-

dress the holding of *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U.S. 131 (1937) which deprived the Court of Appeals of subject matter jurisdiction in the pending action when no appeal was taken within 30 days of the district court's judgment of dismissal. *Oremus* complements *Fine*. *Fine* follows *Wayne United*. But the Fifth Circuit followed neither.

Respondents' reliance on *World-Wide Volkswagen* is even farther misplaced, for that decision fairly mandates a summary reversal. There is not in the record the slightest attempt to show a single fact that any petitioner was tied to Mississippi by actionable "conduct and connection with the forum State . . . such that he should reasonably anticipate being haled into Court there." 444 U.S., at 297.

Had there been *any* facts of record useful in opposing the instant petition, surely those would have been set out in the brief in opposition. They are not.

Instead, respondents resorted, without having any choice in the matter, to quoting at length from the unsubstantiated complaint. To bolster the fragility of their position, respondents *falsely* claim that the affidavits of petitioners do not contradict the complaint. But consider the following.

The separate answers filed all denied the material allegations and *all* jurisdictional allegations. Only the petitioners gave affidavits acceptable to the district court as being competent and factual. Those affidavits state emphatically and expressly, among other things:

1. That petitioners have never committed a tort in whole or even in part in Mississippi;

2. That none of the petitioners has ever purposely or even inadvertently availed itself of any benefits, pri-

vate of protections afforded by the State of Mississippi;

3. That none of the petitioners have done any act to submit themselves to the long-arm jurisdiction of the forum;

4. That the allegations of the complaint charging commission of a tort in whole or in part in Mississippi are completely in error;

5. That the single long distance call into Mississippi was solely for the purpose of making a lawful inquiry of the United States Attorney who was performing his federal duty in his federal office building;

6. That the petitioners have not committed a tort in Mississippi *or anywhere else* against the respondents; and

7. That the denials asserted in the answer are true.

There is *nothing in the record to contradict these statements.*

If it is true as the Fifth Circuit asserts in *e.g., Black v. Acme Mkts., Inc.*, 564 F.2d 681, 683 n.3 (5th Cir. 1971), that an unsubstantiated complaint cannot overcome the defendants' jurisdiction affidavits, then the decision in the district court below should have been sustained.

The district court said:

plaintiffs' affidavits are mere conclusions, unsupported by specific averments of fact.

It is unthinkable that the Court of Appeals could find a *prima facie* showing of jurisdiction in such weightless documents.

CONCLUSION

The respondents' brief in opposition attempts once again to grossly distort that which occurred below. Respondents do not distinguish and so ignore wholly several bases for certiorari, well-grounded in the decisions of this Court; we can but assume with clear justification that there is obviously less to their opposition and to the underlying case that has heretofore *failed* to meet the eye.

An affirmance would reward prior falsehood, indolence, and an utter want of ability to prove jurisdictional contact. We urge respectfully that if the judgment below be not summarily reversed, as would be appropriate, that a writ of certiorari issue to afford the plenary review for which there is indisputable need. Personal jurisdiction should never be sanctioned upon the foul and empty sort of record which these respondents made below if due process is to have any meaning and subjective value to ordinary litigants.

Respectfully submitted,

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